The Edward S. Quirk Co., Inc. d/b/a Quirk Tire *and* International Brotherhood of Teamsters, Local Union, No. 25, AFL–CIO. Cases 1–CA–33249 and 1–CA–34383

March 20, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 29, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief. The Charging Party also filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified, and to adopt the recommended Order, as modified.[3]

We affirm the judge's conclusion that the Respondent lawfully implemented its health insurance proposal after the parties had reached a good-faith impasse in their contract negotiations. We reach the same conclusion even assuming, arguendo, that impasse did not occur until after unit employees rejected the Respondent's final contract offer on May 18, 1995. Unlike our dissenting colleague, we do not presume that unremedied unfair labor practices preceding the employee vote must have precluded the possibility of a good-faith impasse in negotiations. In this regard, "for the judge to conclude that the unremedied unfair labor practices prevented the parties from reaching lawful impasse, he must first find that there was a causal connection between the previous unfair labor practices and the failure to reach an agreement." *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998) (Board remanded case to an administrative law judge to assess evidence of parties' negotiations to determine whether bargaining was adversely affected by unfair labor practices occurring prior to and during those negotiations). There is no evidence here that the parties discussed or were influenced by the Respondent's unlawful failure to make timely payments into the existing health insurance plan fund during their extensive review and discussion of the Respondent's proposed new insurance plan.[4] Furthermore, there is no credible testimony that statements made by the Respondent to employees on the morning of May 18—which statements the judge found violated Section 8(a)(1), and as to which no exceptions were filed—affected the parties' negotiations or had any impact on the employees' contract vote that evening. Under these circumstances, we find that the General Counsel has failed to prove any causal relationship between the unfair labor practices and the impasse in negotiations.[5]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, The Edward S. Quirk Co., Inc. d/b/a Quirk Tire, Watertown, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a)–(c).

"(a) On request, bargain with the International Brotherhood of Teamsters, Local No. 25, AFL–CIO as the representative of the employees in the above-described appropriate unit, about the method, manner, timing, and amounts of wage and/or incentive pay adjustments of and/or granting incentive pay to the commercial employees, prior to making those wage and/or incentive pay adjustments and/or prior to granting incentive pay to the commercial employees.

"(b) On request by the above-named labor organization, rescind any wage and/or incentive pay adjustments made to the commercial employees as a result of unilateral action.

"(c) Make the commercial employees whole for any financial loss they may have suffered on or after June 1, 1995, as a result of the wage proposal unlawfully implemented on that date."

2. Substitute the following for paragraph 2(h).

[1] The Charging Party and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Relying on *McClatchy Newspapers*, 322 NLRB 812 (1996), the judge concluded that the Respondent's unilateral post-impasse implementation of its wage incentive proposals violated Sec. 8(a)(5). We affirm the judge only as to its implementation of a discretionary wage plan for commercial operations employees. The Respondent lawfully implemented its wage incentive plan for mechanics and alignment technicians, which was based on a nondiscretionary, fixed formula.

[3] We shall modify the recommended provisional notice mailing remedy in accord with *Excel Container*, 325 NLRB 17 (1997).

[4] Our dissenting colleague suggests that the Respondent's failure to make payments was an effort to "husband funds" so that the Respondent could declare impasse and implement its own plan. This theory is simply the speculation of our colleague. It is not supported by the evidence. Indeed, it is not even a contention of the General Counsel.

[5] *Columbian Chemicals Co.*, 307 NLRB 592 fn. 1 (1992), cited by the dissent, does not compel finding a violation here. In that case, the Board held that unilateral implementation and enforcement of a new absenteeism policy precluded finding that the parties subsequently bargained in good faith to impasse about the implementation of that policy. Although the dissent implies otherwise, the Respondent's failure to make timely payments under the old health insurance plan was not tantamount to implementation and enforcement of its proposed new plan.

"(h) Within 14 days after service by the Region, post at its facility in Watertown, Massachusetts, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 1995."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER FOX, dissenting in part.

The General Counsel and the Charging Party have excepted to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its health insurance proposal on June 1, 1995. My colleagues have adopted that dismissal. For the following reasons, I would grant the exceptions and find the violation.

When negotiations for a new collective-bargaining agreement commenced in June 1994, employees had health insurance coverage under the Teamsters Health and Welfare Plan, which had been provided by the Respondent pursuant to the terms of the expired agreement. Although the Respondent began proposing, early in the negotiations, to introduce employee copayments for their health insurance, it was not until March 22, 1995,[1] that it suddenly proposed not only that copayments be required but that the existing plan be dropped and a Blue Cross/Blue Shield plan be substituted. It is undisputed that even before the day it made that proposal, the Respondent unilaterally ceased making payments into the existing plan.[2] The judge and my colleagues agree that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Health insurance was a contentious, high profile issue in the negotiations, and the union negotiators registered strong objections to the substitution of the new plan; but they agreed that the Respondent's entire contract proposal, including the substitute health plan with a phased-in copayment eventually reaching 25 percent, could be submitted to the employees for ratification. The ratification vote was scheduled for the evening of May 18. It is undisputed that in a meeting on the morning of May 18, which the Respondent required all unit employees to attend, Peter Quirk, one of the Respondent's co-owners, told the employees that "regardless of how they voted that evening, there was going to be a 25 per cent copayment." The judge found that Quirk's statement violated Section 8(a)(5) and (1) of the Act, and there are no exceptions to that finding.

The employees voted to reject the Respondent's contract proposal at the scheduled May 18 meeting. The next day the Respondent began distributing enrollment forms for the new health plan, and it put the plan into effect on June 1. The judge and my colleagues do not disagree that the Respondent's unilateral implementation would be unlawful if the parties had not previously reached impasse. Rather, they find that a "good faith impasse" was reached, either on May 15 or May 18, and that this privileged the subsequent implementation. I find that conclusion untenable.

The seminal case concerning impasse defines it as a situation in which "good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The Board will not find that impasse has occurred if that outcome is reached "in the context of serious unremedied unfair labor practices that affect the negotiations." *Great Southern Fire Protection*, 325 NLRB 9 fn. 1 (1997), enfd. mem. 180 F.3d 274 (11th Cir. 1999). In my view, the Respondent's unlawful cessation of payments into the existing health plan precludes any finding that it was engaging in "good faith negotiations" on the health insurance issue. See *Columbian Chemicals Co.*, 307 NLRB 592 fn. 1 (1992) (unilateral implementation of an "absence control program" precluded a finding of a "valid good faith impasse" on that issue).[3] Thus, I would not find that the parties had reached lawful impasse on this issue, even assuming that impasse could otherwise be found *before* the employee ratification vote was conducted. Certainly, by the time of the ratification vote, on the evening of May 18, when

[1] All dates hereafter are in 1995 unless otherwise stated.

[2] Although the Respondent eventually made the payments for February through May, it did not even begin making up these missed payments until May 25, and the obligation was not completely satisfied until the following November. The judge rejected the Respondent's defense that its payment delays reflected "cash flow problems." The judge noted that such a claim did not state a valid defense, and that, in any event, the Respondent chose to make payments to its own substituted plan on June 1 rather than satisfy its obligations to the existing plan. Thus, as he found, the Respondent's "failure to pay was willful and undertaken in bad faith."

[3] While it is true, as my colleagues assert, that the pre-impasse unilateral change at issue here was not an *implementation* of a new health insurance plan, the change still constituted unlawful unilateral action with respect to the plan under negotiation—a plan which the Union hoped to keep and the Respondent sought to change. Moreover, by failing to make the payments, the Respondent was able to husband funds that enabled it to declare impasse and implement its own substitute plan. Thus, in my view there is a sufficient connection between the unlawful conduct and the subsequent impasse on the subject of a health care plan.

the Respondent had not only ceased payments for the current plan but had also unlawfully informed the employees that it was going to institute new copayments "regardless of how they voted," any basis for finding lawful impasse had vanished.[4]

In sum, because the Respondent had, by unlawful conduct, laid the groundwork for its unilateral implementation of the new health insurance plan even before any claim of bargaining deadlock had been made, I would find that it violated Section 8(a)(5) and (1) of the Act by implementing the plan on June 1.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in, or undermine the status of, the International Brotherhood of Teamsters, Local No. 25, AFL–CIO, by telling you that the Union no longer exists, by refusing to discuss grievances with the Union's representatives, by unilaterally implementing changes in the terms and conditions of employment of employee Kenneith R. Jones or any of you, without notifying and consulting the Union first, or by disciplining, or by discharging Kenneith R. Jones, or any of you, or by discriminating in any other manner in regard to your tenure of employment or any other term or condition of your employment.

WE WILL NOT adjust the wages and/or incentive pay of and/or grant incentive pay to commercial employees without first offering to bargain with the Union, as the representative of the retail and commercial operations service employees, about the method, manner, timing, and amounts of those adjustments, and/or incentive pay to be granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the representative of the following appropriate unit about the method, manner, timing and amounts of wage and/or incentive pay adjustments of the commercial employees, prior to granting those adjustments:

> All employees engaged in the maintenance and servicing of tires, including all tire men, front end men, and helpers employed by us at our Watertown facility, excluding all executives, office clericals, counter salesmen, porters, salesmen, driver salesmen, guards, professional employees, and supervisors as defined in the Act.

WE WILL, on request by the Union, rescind any wage and/or incentive pay adjustments made and/or incentive pay granted to the commercial employees as a result of our unlawful unilateral action.

WE WILL make the commercial employees whole for any financial loss they may have suffered since June 1, 1995, as a result of the wage and/or incentive pay adjustments unlawfully implemented and/or incentive pay unlawfully granted on that date.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Kenneith R. Jones to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed, and under the same terms and conditions of employment which pertained to him prior to August 1, 1995.

WE WILL make Kenneith R. Jones whole for wage and benefit losses that he may have suffered as a result of the discrimination against him, including his unlawful termination and the unlawful changes made on August 1, 1995, to his wage incentive plan, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kenneith R. Jones, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

THE EDWARD S. QUIRK CO., INC.

Robert J. DeBonis, Esq., for the General Counsel.
Arthur P. Menard and *Cheryll L. Robertson, Esqs*., of Boston, Massachusetts, for the Respondent.
Christine L. Nickerson, Esq., of Boston, Massachusetts, for the Charging Party.

[4] I do not agree with my colleagues that *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998), requires a different result. The Board remanded that case for a determination by the judge whether unremedied unfair labor practices found by the Board in two earlier cases adversely affected bargaining on the issues in the remanded case on which the employer was claiming impasse. Although asserted impasse privileging implementation of new group health insurance proposals was at issue, and the unremedied unfair labor practices included unilateral increases in health insurance premiums during a period 2 to 5 years before that implementation (*Dynatron/Bondo*), 323 NLRB 1263, 1265 (1997), there was no indication that, as in the present case, there had been unilateral changes on the subject during the course of negotiations on the very proposals at issue.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Boston, Massachusetts, on December 17–19, 1996. The charge in Case 1–CA–33249 was filed on August 4, 1995, and was amended on September 29, 1995, December 5, 1995, and October 30, 1996. The charge in Case 1–CA–34383 was filed on July 31, 1996, and was amended on October 30, 1996. An order consolidating cases, consolidated complaint, and notice of hearing were issued on November 6, 1996. The Respondent's timely answer essentially denied the material allegations of the consolidated complaint.[1] The parties were afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Watertown, Massachusetts, is engaged in the operation of a tire warehouse and service center. It annually purchases and receives at its Watertown facility goods valued in excess of $50,000, directly from points outside the Commonwealth of Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Whether the Respondent unlawfully delayed payments to the Union's health and welfare fund in violation of Section 8(a)(5) of the Act.

2. Whether the Respondent and Union reached impasse on May 15, 1995, or at any time thereafter.

3. Whether Peter Quirk's remarks on May 18, 1995, that there would be a health insurance copayment regardless of how the union members voted violated Section 8(a)(1) of the Act.

4. Whether John and Peter Quirk made other remarks on May 18, 1995, that violated Section 8(a)(1) of the Act.

5. Whether the Respondent's unilateral implementation of its health insurance proposal on June 1, 1995, violated Section 8(a)(5) of the Act.

6. Whether the Respondent's unilateral implementation of its wage proposal on June 1, 1995, violated Section 8(a)(5) of the Act.

7. Whether James DeSouza unlawfully told Union Steward Kenneith Jones in June and August 1995, that there no longer was a union and that he did not have to discuss employees grievances, in violation of Section 8(a)(1) and (5) of the Act.

8. Whether the Respondent violated Section 8(a)(5) of the Act, when it unilaterally changed Kenneith Jones' terms and conditions of employment on or about August 1, 1995.

9. Whether Peter Quirk unlawfully told Kenneith Jones on August 31, 1995, and March 11, 1996, that he could not collect union dues in violation of Section 8(a)(1) of the Act.

10. Whether the Respondent unlawfully disciplined Kenneith Jones on August 31, 1995, and terminated his employment in March 1996 in violation of Section 8(a)(3) of the Act.

B. Facts

1. The collective-bargaining relationship

Since at least 1990, and continuing through January 1994, the International Brotherhood of Teamsters, Local Union No. 841, AFL–CIO (Local 841) was the exclusive bargaining representative for the purposes of collective bargaining of the Respondent's employees in the following appropriate unit:

> All employees engaged in the maintenance and servicing of tires, including all tire men, front end men, and helpers employed by Respondent at the Watertown facility, excluding all executives, office clericals, counter salesmen, porters, salesmen, driver salesmen, guards, professional employees, and supervisors as defined in the Act.

Recognition of the exclusive representative was embodied in successive collective-bargaining agreements, the most recent of which was effective from June 19, 1991, to January 31, 1994 (the 1991–1994 contract).

During the term of the 1991–1994 contract, the parties negotiated successive wage reopeners resulting in wage increases, effective June 1, 1992, and June 1, 1993. Notwithstanding the negotiated wage increases, the Respondent paid its employees more than the contract wage rate, a practice which it unilaterally implemented sometime before the 1991–1994 contract expired.[3] Peter Quirk, a co-owner, who began working for the Respondent sometime in 1992, conceded that the Respondent had unilaterally increased wages without giving Local 841 any notice or an opportunity to bargain, and that he did not know whether Local 841 even knew about the changes. In addition, the Respondent unilaterally implemented without notice to Local 841, wage incentive plans for its recap employees, and an off-the-road (OTR) serviceman, named Kenneith Jones, who was the union steward. Peter Quirk said that the wage incentive plans were implemented by his brother, John Quirk, the other co-owner, in order to retain qualified employees and make the Respondent competitive with other tire businesses in the area. To the best of Peter Quirk's knowledge, neither the wage increases nor the wage incentive plans were ever set forth in any collective-bargaining agreement with Local 841.[4]

Although John Quirk confirmed that the Respondent's employees were being paid more than the contract rate and that the wage incentive plans had been in place for a long time, he

[1] On December 9, 1996, which was about a week before the hearing started, the Respondent filed a motion to Collyerize and/or motion to dismiss which was opposed by the General Counsel and the Union. I reserved ruling on the motions, which I now deny for the reasons stated herein.

[2] The Respondent also filed an assented to motion to correct the record, and a motion for leave to file a reply brief, both of which were unopposed and both of which are granted. I have read and considered the Respondent's reply brief, which was attached to the respective motion.

[3] The record is unclear precisely when the Respondent began unilaterally paying employees more than the contract wage rates.

[4] The General Counsel and Charging Party do not argue, and the complaint does not allege, that any of these unilateral changes violate the Act.

stated that Local 841's business agents knew about the higher wages and the wage incentive plans. John Quirk testified that the wage incentive plans were part of the prior collective-bargaining agreement, which expired in 1991. When viewed against the preponderance of evidence, however, John Quirk's assertions are dubious. The prior collective-bargaining agreement, which could have easily corroborated his testimony, was never marked for identification or offered as evidence, thereby casting doubt on John Quirk's testimony. Adding to the suspicion is the fact that the most recent collective-bargaining agreement indisputably does not provide for a wage incentive plan. Nor is there any evidence that the subject was discussed during the 1991 contract negotiations or subsequently when the successive wage reopeners were negotiated. The only person who testified that Local 841 knew about the higher wage rates and the wage incentive plan was John Quirk, whose testimony was contradicted by his brother, Peter Quirk, and rebutted by the union representatives. Jones testified that he did not advise any Local 841 representative of his wage incentive plan and Vincent Pisacreta, a business agent for International Brotherhood of Teamsters, Local No. 25 (Local 25 or the Union), which succeeded Local 841, testified that he was unaware of the wage incentive plans, when he began negotiating a renewal contract in June 1994. I therefore do not credit John Quirk's testimony that the Union's business agents were aware that employees were being paid more than the contract rates or that they were aware that some employees were being paid wage incentive rates or that the wage incentive plans were part of a prior collective-bargaining agreement.

In addition, the Respondent had unilaterally changed the work schedules of several employees, prior to the contract expiration date, without notification or discussion with Local 841. Peter Quirk testified that he changed work schedules in the retail division on a regular basis in order to accommodate personal schedules. As Peter Quirk testified, "[w]hatever worked for them is what we did. My attitude was a happy employee would work better." Among those affected by this policy was Union Steward Kenneith Jones, who also worked full time for the City of Boston Fire Department. Peter Quirk testified that Jones had a flexible work schedule, which allowed him to leave work at 3:30 p.m. or come in late some mornings, when he had to work at the fire department in the evening. Although he said that the flexible schedule was discontinued in 1994, the evidence reflects that it was continued into 1996. (R. Exh. 26B.) John Quirk similarly testified that he routinely sat down with Jones to arrange his work schedule to accommodate his duty tours at the fire department.

2. Bargaining for a new collective-bargaining agreement

In January 1994, Local 841 merged with Local 25, which became the exclusive bargaining representative of the Respondent's unit employees. On January 31, the 1991–1994 contract expired.

On June 3, 1994, the parties commenced negotiations for a new collective-bargaining agreement. While negotiations proceeded, the terms and conditions of the contract continued in effect at least up until February 1995. At the same time, the Respondent continued paying wages above the contract wage rates and continued the wage incentive plans for the recap and OTR employee.

The Union's initial proposals included, among other things, a percentage increase in employer contributions to the health and welfare plan (proposal 5), which was not agreed on; a completely revised dues-checkoff provision (proposal 7), which was agreed on; a set time for lunch and breaks to be taken between the hours of 11 a.m. and 3 p.m. (proposal 10), which was agreed on; and a wage increase of 5 percent in each successive year of the contract for all employees (proposal 14), which was not agreed on. When the parties met again on June 20, the Respondent proposed, among other things, a wage incentive plan for general mechanics and alignment technicians in retail operations.[5] The wage incentive plans provided for an incentive of 8 percent over base. The over base was calculated using a formula which multiplied the mechanics gross pay (based on an average 42-1/2 hour week x hourly rate) times 4.3 for a weekly incentive base, which was subtracted from total sales for 1 week for an incentive over base. That figure was then multiplied by 8 percent and the product was added to gross pay for a weekly total pay. The Respondent also proposed a flat 50-percent health insurance employee copayment. There was no agreement on the wage incentive and health insurance proposals.

Two more bargaining sessions were held in 1994, and four were held in 1995, with some progress being made during this time. By February 1995, however, negotiations had reached a standstill. The Respondent's proposals for the mechanic/alignment technician's wage incentive plans and the health insurance copayment had become sticking points. An "off-the-record" session held on February 7, 1995, was devoted to resolving the parties' differences on these issues, but little if any progress was made. The consensus at that point was that the participation of a Federal mediator was needed.

3. The failure to make timely contributions to the Union's health and welfare trust fund

In the midst of this critical stage in negotiations, when the parties were having no success in reaching agreement on the Respondent's health insurance copayment proposal (or the wage incentive plans), the Respondent stopped making its monthly payments to the Teamsters Health and Welfare Fund. Peter Quirk testified that the payments from February through May 1995, were "delayed" because the Respondent was experiencing cash-flow problems.[6] He explained that the Respondent had spent a great deal of money on inventory and equipment.

4. The inability to agree on the health insurance and wage incentive proposals

On March 22, 1995, the parties met with a Federal mediator. The Respondent presented new proposals for mechanic/alignment technician wage incentive plans and the health insurance copayment. The new wage incentive proposal was a simplified calculation based on a minimum hourly wage of $10 for mechanics, plus a 6-percent commission on all parts and labor. The alignment technicians would receive a minimum hourly wage of $8, a payment of $5 or $6 for either a 2-wheel or 4-wheel alignment, plus a 6-percent commission on all parts and labor. The health insurance proposal sought to switch from the

[5] The Respondent's business operations were divided into two parts: retail and commercial. The Respondent's wage incentive proposal did not encompass the commercial operations employees like recap men and the OTR serviceman, who already were covered by wage incentive plans unilaterally implemented by the Respondent without the union's knowledge or consent sometime prior to the expiration of the 1991–1994 contract.

[6] The Respondent eventually made the February payment on May 25, and the March, April, and May payments on November 7, 1995.

employees from the Teamsters Health and Welfare Fund plan to a Blue Cross/Blue Shield plan, with a graduated copayment beginning with 5 percent on April 1, 1995, increasing 5 percent every 6 months thereafter to 20 percent on October 1, 1996.

The Union asked for time to examine the new proposals, and undertook a cost/benefit study comparing the Union's health plan to the proposed Blue Cross/Blue Shield plan. The study was completed on or about April 4. For reasons unexplained, however, the Union canceled two negotiating sessions with the Federal mediator scheduled in April. On May 1, the Respondent's chief negotiator and counsel, Arthur Menard, faxed a letter to the Union, which stated, in pertinent part:

> Since the Union has now canceled two negotiating sessions . . . and indicates that it will not be available until the middle of May, we thought it best to expedite the negotiating process by transmitting to you copies of the Company's final offers and demands with regard to health insurance co-pay and wage incentives and the Company's demand for drug-free workplace language.
>
> I am also transmitting to you all other proposals that have been agreed to. It would be our intention to incorporate these into any final agreement between the parties. If we fail to hear any substantive objection from you by Friday, May 5, 1995, then it will be the Company's intention to implement all of these offers and demands, no later than Monday, May 8, 1995.

The Respondent's "final offers," however, were notably different from its March 22 proposals. The copayment for mechanics and alignment technicians was increased an additional 5 to 25 percent by April 1, 1997. Also, a provision regarding wage benefits for all other employees (e.g., commercial operations employees) was added:

> All other employees shall be paid a base rate of not less than $8.90 an hour, however, the Company may continue its current marketplace pay practices for the term of this contract.

As for the agreed-upon proposals transmitted with the May 1 letter, the parties agreed to substitute Local 25 for Local 841 in the new contract, and agreed to provisions concerning holidays, checkoff, credit union, safety shoes, lunch hours, nondiscrimination, and a drug free workplace.

Union Business Agent Pisacreta promptly responded by letter stating that the Union was requesting further meetings with the Federal mediator regarding the Respondent's proposals on health insurance copayment, wage incentives, and drug free workplace issues. Pisacreta's letter also stated, "[I]t is our position that no final offer has been agreed to as yet."

5. The final bargaining session

The final bargaining session was held in the Federal mediator's office on May 15. Neither side was willing to make any concessions on the health insurance copayment or wage incentive issues. When the parties caucused, the Federal mediator told Pisacreta that they were very far apart on the health insurance copayment issue. At the Respondent's urging, Pisacreta agreed to bring the Respondent's proposals to the union membership for a vote, but he stated that his committee would not recommend ratification. As the session ended, the following exchange took place between the Respondent's chief negotiator, Arthur Menard (AM) and the Union's business agent, Red Sheehan (RS):

> AM It is time to recognize co-pay—it is not unusual to have 30% co-pay—it's a fact of life now. What we are asking for is not illogical or irrational it's not a position to hurt anyone, the employees or union. Our mind is made up.
>
> RS And ours are too.
>
> AM Didn't want to come to this.
>
> RS We are a committee it's up to the people—we'll present them with the proposal, we will not recommend it in anyway to the committee.[7]

Later that day, the Union posted a notice at the workplace informing its members that a meeting would be held at the union hall on the evening of May 18, to review and vote on the Respondent's contract proposals.

6. The May 18, 1995 meetings

On May 17, the Respondent posted a notice requiring all employees to attend an important meeting the next morning at 7 a.m. sharp. The meeting was called ostensibly to discuss employee rights in the event of a strike, but in reality to discuss the Respondent's contract proposals. Peter and John Quirk attended the Respondent's meeting. Peter Quirk told the employees that the Respondent had proposed a 25-percent employee health insurance copayment which they would pay regardless of which plan applied. Although he testified that he was merely echoing the Respondent's bargaining position, Peter Quirk conceded on cross-examination that the gist of what he told the employees was "regardless of how they voted that evening, there was going to be a twenty-five percent co-payment."

At the May 18 meeting, the Respondent also distributed a letter to the employees which outlined a "few facts" about the Union's right to fine members for crossing a picket line. In answering an employee's question about the letter, Peter Quirk explained that in the event of a strike, the Respondent reserved the right to hire replacement workers and "as long as the replacement worker was holding that position, [a person's] job would be taken." It was further explained that "if the replacement worker was still working in the job when the strike ended, the employee would not be able to return to his job, unless and until the replacement worker quit." Jones testified that Peter Quirk told the employees that "if we went on strike, that he could hire replacement workers and didn't have to hire us back." His recollection on its face is consistent with Peter Quirk's testimony.

7. The Respondent's unilateral implementation of its wage and health insurance proposal

At the union meeting on May 18, the membership voted to reject the Respondent's proposals and to authorize a strike. On May 19 or 20, the Respondent began distributing the health insurance enrollment forms and on May 24, it held a health

[7] Peter Quirk testified that as the session ended Business Agent Red Sheehan told him that he thought the contract would be rejected and that the employees would go on strike. In contrast, Sheehan testified that he assured Peter Quirk that the Union would not strike. I credit Peter Quirk's recollection of the conversation, primarily because Sheehan's prediction of a strike is consistent with the Union's bargaining stance at that point in time. It would have made little sense for Sheehan to steadfastly declare that the Union's mind was made up, and then minutes later vacillate by outright dismissing the possibility of a strike. Peter Quirk's recollection that Sheehan predicted a strike is further supported by the fact that a few days later the union members voted to reject the Respondent's proposals and to authorize a strike.

insurance meeting to ensure that the employees signed up for the new Blue Cross/Blue Shield plan.

By letter, dated May 30, Pisacreta objected to the change in health insurance plans, as well as the unilateral implementation of the Respondent's health insurance proposal. He also pointed out that "Local 25 remains willing to discuss your proposal to change plans, as well as other issues, at the bargaining table."

Pisacreta's letter apparently crossed in the mail with a letter, dated June 1, from Arthur Menard, Esquire, which stated:

> This is to advise you that the company is implementing the wage and benefit offers which it made to the Union prior to rejection by the membership and subsequent impasse. With respect to all other contract offers, the company is herewith withdrawing them.

On June 1, the Respondent implemented its Blue Cross/Blue Shield health insurance plan. It also put into effect its wage and benefits proposal which included the incentive plans for the mechanics and alignment technicians (while continuing in effect the wage incentive plans for recap and OTR employees).

In addition, the Respondent changed the work schedules of several employees, who brought the matter to the attention of Jones as their union steward. When he approached Service Manager James DeSouza about the changes, DeSouza purportedly told Jones that he did not have to discuss the matter with Jones because there was no union.[8]

8. The additional changes implemented in August 1995

On or about August 1, Supervisor Rich Davis took over the OTR repair service and gave Jones a written memorandum which (1) established Jones' daily work hours as 9:30 a.m. to 6 p.m.; (2) set his lunchtime at 1–1:30 p.m.; (3) required him to request time off 2 weeks in advance; and (4) set a production goal of four section repairs per day.[9] The memo also stated that Jones' wage incentive would be altered as follows:

> The incentive will be paid on a quarterly basis. The three month total must be a minimum of $45,000.00 in order to qualify for an incentive payment.

When Jones tried to explain to Davis that the new hours conflicted with his fire department schedule, he was referred to John Quirk, who said that he would get back to Jones, but he never did.

Around the same time, rumors were circulating that the Respondent had stopped withholding union dues from the employees' paychecks. Jones asked Office Manager Lutz to explain why union dues no longer were being deducted. According to Jones, Lutz told him that Peter Quirk said that there no longer was a union and therefore it no longer had to deduct union dues. Jones called Pisacreta, who told him to collect the union dues directly from the employees and submit them to the Union, which Jones proceeded to do.

9. The discipline of Jones and the termination of his employment

On August 31, Jones spoke with Peter Quirk about the dues deductions. Jones testified that Peter Quirk told him that he could not collect union dues because there was no union. Quirk also told Jones to have Pisacreta call Arthur Menard for further explanation, whereupon Jones told Peter Quirk to have Menard call Pisacreta, who would tell him whether there was a union.

On February 22, 1996, Jones prepared a letter to Peter and John Quirk complaining about how he had been treated over the last few weeks and requesting a meeting to discuss his treatment. Specifically, Jones stated that ever since he gave a "deposition" to the Board, he had been unfairly treated and harassed, and his quarterly wage incentive pay had been denied. Neither Peter or John Quirk met with Jones to address his concerns.

On March 11, Jones again solicited union dues and again was told by Peter Quirk that there was no longer a union and that he could not collect union dues. According to Jones, Peter Quirk also said that the employees would be better off without the union. When Jones told Peter Quirk that the employees would "really get the shaft" without a union, Peter Quirk walked away.

On March 12, Jones worked at the fire department during the day. When he returned to his job with the Respondent on March 13, his timecard was missing. He asked David Bradley, a new supervisor, if he knew what happened to the timecard. Bradley did not know, but said he would try to find out. Rather than have Jones punch another timecard, Bradley told him to wait while he looked into the matter. Jones testified that when Bradley eventually returned, he told Jones that he was no longer needed so he could go home. Jones therefore left. On Friday, March 15, Arnie MacNeily, a union member, phoned Jones on behalf of Don Roberts, plant manager, and asked Jones to return his keys and uniforms. On Monday morning, Jones returned all of the items to Lucy Wright. A few days later, he received a letter from Bradley terminating his employment for failing to report to work on March 13–15; failing to give his immediate supervisor an explanation for his absence; and failing to respond to messages left on his answering machine.

C. Analysis and Findings

1. Deferral and dismissal

On or about December 9, 1997, the Respondent moved to *Collyerize* and/or dismiss various allegations in the consolidated complaint. Specifically, it moved that the allegations contained in paragraphs 9, 10, 11(a)–(f),[10] and 15 of the complaint, be deferred to arbitration in accordance with the Board's decision in *Collyer Insulated Wire,* 192 NLRB 837 (1971), and *United Technologies Corp.,* 268 NLRB 557 (1984), or, alternatively, as to all but the alleged discharge, that they be dismissed. The above-noted paragraphs allege that Quirk unlawfully discharged Union Steward Ken Jones because of his union activity and because he gave testimony in connection with an unfair labor practice charge, and that the Respondent unlawfully and unilaterally changed his wage incentive plan, work shift, lunch hour, and requirements for requesting leave and work schedules. In addition, the Respondent moved to dismiss

[8] Jones also testified that on or about August 24, he attempted to speak to DeSouza about a warning given to employee Gil Oserio, but he likewise was summarily rebuffed.

[9] Once before, on April 4, 1995, the Respondent prepared a memo seeking to establish a minimum production quota for Ken Jones. There is no evidence, however, that the Respondent followed through with this initiative or that the memo was ever discussed with Jones.

[10] It should be pointed out that par. 11 of the consolidated complaint (G.C. Exh. 1) does not contain any subpars.

the allegations contained in paragraphs 7(c) and (d), which assert that on or about August 31, 1995, and March 11, 1996, Peter Quirk told Ken Jones that he could no longer collect union dues because there no longer was a union. Both the General Counsel and the Charging Party oppose these motions. For the reasons stated below, the Respondent's motions are denied.

a. Deferral

In *Hilton-Davis Chemical Co.,* 185 NLRB 241, 242 (1970), the Board acknowledged that an arbitration clause does not continue in effect after expiration of a collective-bargaining agreement and therefore the parties to the expired agreement have no obligation to process to arbitration matters arising after the contract's expiration date. See also *W. F. Froh, Inc.,* 310 NLRB 384, 386 (1993). In *Litton Financial Printing v. NLRB,* 501 U.S. 190 (1991), the Supreme Court approved the Board's rationale in *Hilton-Davis Chemical Co.,* and stated that if "parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement. Further, a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement or to remain in effect until bargaining to impasse." Id. at 201. The complaint alleges that Jones was unlawfully discharged on March 13, 1996, and that his wage incentive plan, work hours, etc., were unlawfully unilaterally changed on August 1, 1995. Thus, by the time the events at issue in paragraphs 9, 10, 11, and 15 of the consolidated complaint took place, the parties' collective-bargaining agreement had long since expired (Jan. 31, 1994) and impasse had existed since May 15 (as determined below). The Union opposes postexpiration arbitration, and the arbitration clause of the expired contract (G.C. Exh. 2, p. 9) does not reflect an intent by the parties for arbitration to continue beyond the contract expiration date. Therefore, in accordance with *Hilton-Davis Chemical Co.*, no basis exists for deferral.

In addition, the Board has long held that alleged violations of Section 8(a)(4) of the Act will not be deferred to arbitration. *International Harvester Co.*, 271 NLRB 647 (1984). The Respondent's motion glosses over the fact that paragraphs 9 and 11 allege that Ken Jones was discharged in retaliation for giving testimony to the Board in violation of Section 8(a)(4) of the Act. For these additional reasons, deferral is inappropriate.

Accordingly, the Respondent's motion to *Collyerize* is denied.

b. Dismissal

The Respondent asserts that paragraph 15 of the complaint should be dismissed in any event because under the terms of the expired contract (specifically arts. VI and X), as read in conjunction the management-rights clause (art. V), the Respondent had the flexibility to change work hours, set lunch and breaktimes, and establish a procedure for requesting leave. The Respondent also argues that because Jones has a flexible wage incentive plan, it was entitled to implement changes to his plan. Under *NLRB v. Katz,* 369 U.S. 736 (1962), once the parties reach impasse the terms and conditions of employment continue in effect by operation of the Act because there are no longer agreed-upon terms. Instead, the employer is unilaterally barred from changing the terms, which are imposed by law, without bargaining with the union. Where, as here, the employer seeks to make changes which it contends are permitted under the "flexible" terms of the contract, the issue becomes whether or not those "flexible" terms constitute a waiver of the union's statutory right to bargain or whether the union has otherwise waived its right to bargain. In either event, a mixed question of fact and law is present. Because the Respondent is not entitled to dismissal as a matter of law, and because the Union did not waive its statutory right to bargain for the reasons stated below, the motion to dismiss paragraph 15 of the complaint is denied.

The Respondent also moves to dismiss the allegations of paragraphs 7(c) and (d) of the consolidated complaint which assert that Peter Quirk told Ken Jones on August 31, 1995, and March 11, 1996, that he could not collect union dues because there no longer was a union. The Respondent contends that Peter Quirk told Jones that the Company could no longer check dues and that he never told Jones that he could not collect the dues himself. Because the Respondent is not entitled to a dismissal as a matter of law, and because the testimony of Ken Jones has been credited for reasons delineated herein, this aspect of the motion to dismiss is also denied.

2. The unlawfully delayed payments to the Union's health and welfare Fund

The General Counsel and the Charging Party argue, and the complaint alleges, that the Respondent violated Section 8(a)(5) of the Act when it unilaterally delayed payment to the Union's health and welfare fund. The Respondent argues that the delays do not amount to bad faith bargaining and therefore no violation occurred.

It is settled law that when a collective-bargaining agreement expires, an employer must maintain the status quo unless and until the parties reach a new agreement or they bargain in good faith to impasse. *Intermountain Rural Electric Assn. v. NLRB,* 984 F.2d 1562, 1566 (10th Cir. 1993). A contractually required payment to a health and welfare trust fund constitutes a term and condition of employment which survives the expiration of the contract. *Mac Plastics,* 314 NLRB 163 (1994). The failure of an employer to make a series of contractually required contributions to a trust fund without prior notice to, or the consent of, a union violates Section 8(a)(5) of the Act. *Zimmerman Painting & Decorating,* 302 NLRB 856, 857 (1991). Delinquent payments likewise violate the Act, *Detroit Cabinet & Door Co.,* 247 NLRB 1415, 1416–1417 (1980), and an employer's inability to pay is not a valid defense. *Zimmerman*, supra at 857.

The contract which expired on January 31, 1994, required the Respondent to make a payment to the Teamsters Health and Welfare Fund on the 10th day of every month, which it did not do during the period of February to May 1995. The first of those payments was not made until the Respondent began implementing its own health insurance proposal on or about May 25. The balance of payments were not made until November 1995. Although Peter Quirk testified that the Respondent could not pay the trust fund because of a cash-flow problem, the evidence establishes that on June 1, the Respondent began paying insurance premiums for its own Blue Cross/Blue Shield plan, which supports the inference that even though the money was available, the Respondent did not view its contractual obligation to pay the Union's trust fund as a priority. In any event, the fact that the Respondent may have had a cash-flow problem does not excuse the delay. Id. at 857.[11] The credible evidence

[11] In an earlier affidavit, Peter Quirk said that the failure to make payments was not intentional; rather, it was the result of a bookkeeping

therefore shows that the failure to pay was intentional and undertaken in bad faith. I therefore find that the delinquent payments constituted a renunciation of the terms and conditions of the parties' agreement, as well as an abrogation of the Respondent's obligation to maintain the status quo after the 1991–1994 contract expired, in violation of Section 8(a)(5) of the Act.

3. Impasse

The evidence discloses that prior to May 15, there had been some give-and-take at the bargaining table with agreement on a number of issues. The Respondent had provided a detailed rationale for its health insurance and wage incentive plan proposals and the Union had undertaken its own comparative analysis of the health insurance plans. But even with the assistance of a Federal mediator, the two sides remained far apart on the two primary issues: health insurance copayment and a wage incentive plan for mechanics and alignment technicians. When the parties met with a Federal mediator on May 15, negotiations remained deadlocked. "The parties [had] discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party [was] willing to move from its position." *Hi-Way Billboards, Inc.,* 206 NLRB 22, 23 (1973). Nothing better illustrates the posture of negotiations than the final salvo of the principal negotiators, who almost simultaneously declared "our minds are made up" as they prepared to walk out the door. The evidence reflects that at that point the only thing left to do was to submit the contract proposals for an up or down vote by the union members because there was nothing else to discuss. I therefore find that the Respondent and Union were at impasse on May 15.

The General Counsel nevertheless argues that impasse did not exist on May 15 because the union members had not yet voted to reject the Respondent's contract proposals. It cites *Mary Ann's Bakery,* 267 NLRB 992, 994 (1983), for the proposition that impasse does not occur until the contract is accepted or rejected by the union membership. There, the Board affirmed the administrative law judge's conclusion that the parties were not at impasse under facts similar to those here. However, the decision there, as well as here, turns on whether further negotiations may have resulted in the parties in reaching an agreement. In *Mary Ann's Bakery,* the judge concluded that further negotiations would have facilitated an agreement. In the factual context of this case, however, I find, it would not. The Respondent and the Union by their words and conduct on May 15, were stalemated, that is, their minds "were made up." With no other alternative, Sheehan put the matter in the hands of the union membership. If the union members had voted to accept the Respondent's contract proposals that would have changed the circumstances thereby ending the deadlock. Because they voted to reject the Respondent's proposals, the deadlock continued.

The General Counsel and the Charging Party also argue that impasse was precluded by the Respondent's unremedied unfair labor practice, that is, its failure to make timely payments to the Teamsters Health and Welfare Fund from February to May 1995. However, "[t]here is no 'presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching good faith impasse.' *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C. Cir. 1982). Rather, impasse is precluded if there is a causal connection between the employer's unremedied changes and the subsequent deadlock in negotiations. [Citations omitted.]" *Intermountain Rural Electric Assn.,* supra 984 F.2d at 1569–1570. While it appears that in anticipation of a possible deadlock, the Respondent stopped making payments in order to facilitate a transition to the Blue Cross/Blue Shield plan, there is no evidence that the failure to make timely payments affected negotiations. Quite the contrary, the parties met with a Federal mediator in March 1995, the Union took time to analyze the Respondent's new proposals in April 1995, and the negotiations reconvened at the Respondent's urging in May 1995. I find no evidence of a causal connection between the failure to make timely payments and the negotiations or impasse.

The General Counsel and the Charging Party also assert that the Respondent committed other unfair labor practices, as more fully described below, on the morning of May 18, which likewise precluded impasse. Therefore, what transpired after May 15 did not cause or contribute to the impasse. There is no evidence, however, that the Respondent's conduct after May 15, caused or contributed to the impasse.

4. Respondent's postimpasse conduct in violation of Section 8(a)(1) and (5) of the Act

a. Peter Quirk's remarks on May 18, 1995

The complaint alleges and the General Counsel argues that Peter Quirk's statement on May 18, that there would be a copayment regardless of the outcome of the vote, violated Section 8(a)(1) of the Act. It asserts that the remarks tended to undermine the Union, which was not recommending ratification, and influence the employees by suggesting that their vote was an exercise in futility. I agree. The undisputed evidence establishes that the Respondent wanted the union members to ratify the contract proposals, that it knew that the Union was not going to recommend ratification, and that it knew that the ratification vote was scheduled for the evening of May 18. The evidence also establishes the Respondent wanted to avoid the possibility of a strike. Thus, the evidence shows that there was good reason for Peter Quirk to want to influence how the union members voted. In light of the timing of Peter Quirk's statements (only hours before the ratification vote), the manner in which the remarks were made (at a mandatory employee meeting), and the content of the message (there will be a copayment regardless), I find that Peter Quirk's remarks were intended to undermine the Union's status as the exclusive bargaining representative, as well as its recommendation against ratification in violation of Section 8(a)(1) of the Act.

b. The other remarks attributed to Peter and John Quirk on May 18

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act because Peter Quirk told the employees that they would be permanently replaced if they went on strike. The evidence, however, falls short of establishing that the employees were told that they "would" be permanently replaced. Both the testimony of Peter Quirk and Union Steward Jones establish that Quirk told the employees that they "could" be replaced permanently in the event of a strike. Contrary to the

error that came to his attention when an unfair labor practice charge was filed. When he was later asked to reconcile the inconsistency between his testimony and affidavit statement, his explanation was confusing and unpersuasive. Peter Quirk also attempted to downplay the significance of the delayed payments by stating that the Union told his office manager, Josephine Lutz, that the Respondent should do the best it could in making up the delayed payments.

General Counsel's assertions, the remark does not constitute a threat and the evidence does not establish that it was made in the context of other threats. Nor did a violation occur because Quirk did not convey an accurate and complete explanation of the employees' reinstatement rights under the Act. The Board has long held that "an employer may address the subject of striker replacement without fully detailing the protections numerated in the Act [*The Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969)], so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw.*" *Eagle Comtronics,* 263 NLRB 515, 516 (1982). While Peter Quirk's comments may have been legally incomplete, they do not suggest or intimate that any employee rights would be denied as a result of a strike.[12] I therefore shall recommend that the allegations contained in paragraph 7(a)(iv) of the complaint be dismissed.

The complaint also alleges that John Quirk unlawfully threatened employees by telling them that they would be terminated if they did not ratify the Respondent's contract proposals. Jones testified that after the May 18 meeting ended, John Quirk told some employees that if they did not vote for the Respondent's contract proposals, they should not come to work the following day. John Quirk generally denied making this statement. Upon further inquiry, Jones testified that he did not actually hear John Quirk make the statement "first hand," but that it purportedly was made to a group of employees, who conveyed the information to Jones. A few minutes later Jones contradicted himself by saying that he heard John Quirk make the statement during the meeting. No one was called as a witness to corroborate Jones' testimony. In light of the contradiction, the lack of corroboration, and the reliance on hearsay, and in the absence of credible evidence that John Quirk made the statement, I shall recommend that the allegations of paragraph 7(a)(ii) of the complaint be dismissed.

According to paragraph 7(a)(iii) of the complaint on May 18, the Respondent threatened the employees with job loss if they refused to enroll in Respondent's new health plan. Ken Jones testified that, in addition to Peter and John Quirk, the May 18 meeting was attended by Lucy Wright, a secretary, and Josephine Lutz, the office manager, who were employed by Respondent. Jones stated that Wright and Lutz distributed enrollment forms for health insurance coverage and told the employees to return them completed by June 1 or they would not have any health insurance. Jones refused to sign his form without consulting the Union, so he faxed a copy to Pisacreta when the meeting ended. According to Jones, the form was discussed at the union meeting that evening. I am not persuaded that it was, nor am I persuaded that the health insurance form was passed out at this meeting. Instead, the evidence reflects that Jones had possibly confused the May 18 meeting with a later meeting held on May 24. Lucy Wright credibly testified that she did not attend the May 18 meeting and to the best of her knowledge neither did Josephine Lutz. Moreover, the General Counsel presented no evidence to corroborate Jones' testimony—not even Pisacreta substantiated it. Pisacreta was unsure when he first saw the enrollment form, and he did not indicate how or when he came to possess it. Although he recalled receiving a phone call from Jones stating that the Respondent was asking the union members to fill out the forms, and although he advised him to have everyone fill out the forms or else they would not have any health insurance, Pisacreta could not remember when he received the call. Pisacreta also failed to corroborate Jones' assertion that the enrollment form was discussed at the union meeting on May 18. Jones' recollection of the May 18 is therefore questionable.

On the other hand, Peter Quirk's testimony about the May 18 meeting was plausible. While he admitted that he told everyone that they would have to pay a 25-percent copay regardless, he denied that the enrollment forms were given out on May 18 and testified that Josephine Lutz distributed them on either the Friday or Monday after the ratification vote (i.e., either on May 19 or 22). He also said that another meeting was held on May 24, to explain the health insurance plan. Peter Quirk stated that after the May 24 meeting, he faxed a copy of the enrollment form to Pisacreta because he had heard that the Union was telling its members not to sign the form. I therefore credit Peter Quirk's testimony that the enrollment forms were not distributed on May 18.

Peter Quirk also denied that the employees were told that they would be terminated if they did not join the Blue Cross/Blue Shield plan. Rather, the unrebutted testimony establishes that the Respondent had a practice of requiring employees either to participate in the company sponsored health insurance plan or provide proof of alternative coverage as a condition of employment. I credit his testimony that the practice was followed when the Respondent sought to implement its Blue Cross/Blue Shield plan and that no one was threatened with termination if they did not sign up.

Because Jones' recollection of the May 18 meeting is questionable and in light of the credible evidence concerning the Respondent's practice, I shall recommend that the allegations of paragraph 7(a)(iii) of the complaint be dismissed.

c. The implementation of the Respondent's health insurance proposal

Where the parties have bargained to good-faith impasse, an employer may proceed to implement the changes it proposed to the union in negotiations without violating Section 8(a)(5) of the Act. *Taft Broadcasting Co.,* 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968). Having reached good-faith impasse on May 15, the employer was entitled to implement its health insurance proposal after that date, which it did. The General Counsel and the Charging Party do not argue, nor does the evidence reflect that the health insurance proposal implemented was different in any respect from the plan proposed by the Respondent during negotiations. Accordingly, I shall recommend that allegations of paragraph 15(c) of the complaint be dismissed.

d. The unlawful unilateral implementation of the Respondent's wage proposal

By letter dated June 1, 1995, the Respondent's counsel advised the Union that it was implementing its final wage and benefit offers, which included a wage incentive plan for mechanics and alignment technicians, and which afforded the Respondent complete discretion to adjust wages and the wage

[12] The Charging Party at p. 22 of its brief implies that the employees would have been unfair labor practice strikers and that the Respondent therefore violated the Act by telling unfair labor practice strikers that they would be permanently replaced. There is no evidence which even remotely supports an inference that if the employees had chosen to strike, it would have been responsive to an unfair labor practice. Rather, the evidence supports an inference that a strike, if it had occurred, would have been based on economic issues.

incentive plans in response to marketplace conditions. The Respondent's final offer stated:

> All other employees shall be paid a base rate on not less than $8.90 an hour, however, the Company may continue its current marketplace pay practices for the term of this contract.

According to Pisacreta's unrebutted testimony, when this language was discussed in the final bargaining session, the Respondent indicated that it wanted to continue its "marketplace practice" of paying employees what it thought they were worth.[13] The evidence reflects that by this provision the Respondent sought to retain unlimited discretion to adjust wages and/or alter the wage incentive plans, without any established criteria for determining the method, manner, time, duration or amount of the adjustments.

While the Respondent was free to insist to impasse on its wage proposal, it was not free to unilaterally implement the proposal after impasse without consulting the Union. *Colorado-Ute Electric Assn.,* 295 NLRB 607, 609–610 (1989). In *McClatchy Newspapers,* 322 NLRB 812 (1996), the Board held that wage proposals, like the one here,

> "[That] confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay. . .[are] *inherently* destructive of the fundamental principles of collective bargaining" violative of Section 8(a)(5) of the Act. [Quoting from *McClatchy Newspapers*, 321 NLRB 1386, 1388, 1391 (1996) *(McClatchy II*).]

Contrary to the Respondent assertions, the Union did not waive its statutory right to bargain over wage increases under Section 8(a)(5). By letters dated May 4 and 30, the Union objected to the proposed changes. There is no language in the expired contract waiving the right to bargain and the credible evidence shows that the marketplace practice was unilaterally implemented without notice or an opportunity for the Union to bargain.

Because the Respondent's wage proposal as unilaterally implemented on June 1, 1995, contained a provision allowing it broad discretionary power to unilaterally adjust wages and the wage incentive plans without any established criteria, it contravenes the Board's ruling in *McClatchy II.* Accordingly, I find that the Respondent unlawfully implemented its wage proposal on or about June 1 in violation of Section 8(a)(5) of the Act.

e. DeSouza's unlawful refusal to recognize and deal with Union Steward Ken Jones

The complaint alleges (par. 7(b)), and Jones testified, that on two occasions Service Manager James DeSouza told him that there no longer was a union and that he did not have to deal with Jones as the union steward. The first time was in June 1995, when several employees had their work schedules changed,[14] and the next time was in August 1995, when employee Gil Oserio received a disciplinary warning. DeSouza denied making those remarks and denied that he refused to recognize Jones as the union steward. He further denied ever having any discussion with Jones in his capacity as union steward regarding any employee problems or discipline. His denials were so broad, however, that he was unconvincing. His testimony was generalized and he had trouble recalling specifics about the warnings he gave to employee Oserio. For these, and demeanor reasons, I do not credit DeSouza's testimony.

In addition, a longitudinal view of all the evidence lends credence to Jones' testimony. The evidence shows that from June 1, 1995, and thereafter, the Respondent operated as if there was no union. It had stopped making payments to the Teamsters Union Health and Welfare Fund, it had the employees enroll in its Blue Cross/Blue Shield plan, it had unilaterally implemented its contract proposals, and it had stopped deducting union dues from employee paychecks. Around the same time, the Respondent unilaterally changed Jones' work schedule, without taking into account his tour of duty at the fire department, reduced his wage incentive plan, and advised him of a daily production quota. The evidence supports an inference that the Respondent wanted to minimize Jones' activity as a union representative and that it wanted to emphasize to the employees that the Union was no longer useful. The credible evidence therefore makes it more likely than not, that DeSouza told Jones there no longer was a union and that he did not have to discuss employee concerns and grievances with Jones.

I therefore find that the Respondent violated Section 8(a)(1) and (5) of the Act,[15] when DeSouza told Jones that there no longer was a union and refused to deal with him as union steward.

f. The unilateral changes made in August 1995 to Ken Jones' terms and conditions of employment

The undisputed evidence shows that on or about August 1, 1995, Truck Service Manager Rich Davis gave Jones a memorandum establishing new work rules, which changed Jones' work hours to 9:30 a.m.–6 p.m.; set his lunchtime at 1–1:30 p.m.; allowed him a 15-minute break in the morning and afternoon; and required that he request time off 2 weeks in advance. In addition, the memo required Jones to complete four section repairs per day and restructured his wage incentive plan so that he would be paid on a quarterly basis, if a minimum of $45,000 business was completed in the 3-month period. The memo concluded by encouraging Jones to contact Davis with any comments or suggestions.

The complaint alleges that these unilateral changes violated Section 8(a)(5) of the Act. The Respondent argues that the changes were not unilateral. Rather, the Respondent asserts that, with respect to the changes in hours, lunchbreaks, and the procedure for requesting leave, they were contemplated within the flexible terms of the expired collective-bargaining agreement, specifically article VI (Hours of Work and Overtime), article X (Leaves of Absence) and article V (Management Rights). The Respondent further asserts that there is nothing which precludes it from acting in accordance with mutually agreed-upon contract provisions. The Respondent's argument, however, overlooks the fact that as a matter of law, "an expired [collective-bargaining agreement] . . . is no longer a 'legally enforceable document.'" *Litton Financial Planning,* supra, 501 U.S. at 206. "Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-

[13] Effectively the Respondent sought to perpetuate the unilaterally established wage incentive plans, while at the same time pay employees what it thought they were worth in accordance with competitive market conditions.

[14] I note parenthetically that DeSouza did not deny that the work schedules were unilaterally changed.

[15] Although the complaint does not allege a violation of Sec. 8(a)(5), I nevertheless find that the plain facts support a violation of that section of the Act as well.

upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." Id. Unilateral action with respect to any mandatory subject of bargaining is prohibited "for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5)." *Katz,* supra, 369 U.S. at 743.[16]

The issue therefore is not whether the expired collective-bargaining agreement authorized the Respondent to make the changes. The issue is whether or not any of the provisions of the expired collective-bargaining agreement cited by the Respondent authorized it to make these changes without first notifying the Union and affording it an opportunity for adequate consultation. That is, do the contractual provisions cited by the Respondent constitute a waiver of the Union's right to bargain. I find that they do not.

Although Respondent asserts that article VI broadly defines "Hours of Work and Overtime," it acknowledges that no contract provision specifically addresses employee shifts, scheduling, or lunch hours. While it points out that article X, pertaining to leaves of absence, requires a written application for an extended leave of absence, it does not identify any language in the contract which requires advance notice (of any kind) to take a day or two off. There is not a single provision in the expired contract that states or suggests that the Union waived its statutory right to be notified and consulted with respect to these changes.

To compensate for the absence of specific contractual authority for unilaterally implementing the changes, the Respondent intimates that article V, the management-rights clause, vests management with authority to control all aspects of business not limited by the contract, thereby permitting Respondent to make unilateral changes. It states:

> The management of the business and operations of the Company, and the authority to execute all the various duties, functions, and responsibilities thereto, remain vested in the Company, subject only to such limitations as are specifically imposed thereon by this Agreement.

The provision does not specifically address the right to change work hours, break and lunchtimes, or the right to establish a procedure for requesting leave or the right to establish a production quota. The Board has held that a generally worded management-rights clause, like this one, will not be construed to waive statutory bargaining rights. *Doerfer Engineering,* 315 NLRB 1137, 1142 (1994). The Board has further held that the waiver of bargaining rights in a management-rights clause is limited to the duration of the contract in which the waiver is contained. *Buck Creek Coal,* 310 NLRB 1240 (1993). I therefore find that the management-rights clause (art. V), in the expired contract, standing alone or when read in tandem with the other contract provisions, does not constitute a waiver of the Respondent's duty to bargain over changes to Jones' work hours, break and lunchtimes, or procedure for requesting leave.

In addition, the evidence establishes that the Respondent's unilateral scheduling of Jones between 9:30 a.m.–6 p.m., actually changed the status quo as established by existing policy. Peter Quirk stated that he changed work schedules on a regular basis to accommodate employee personal schedules. He testified that "[w]hatever worked for them is what we did. My attitude was a happy employee would work better." Among those affected by the policy was Ken Jones, who routinely had his work schedule arranged to accommodate his duty tours at the fire department. He typically was scheduled to work between 7:30 a.m.–4 p.m., and was allowed to leave early when he had to work nights at the fire department. He also was allowed to come to work late when he work the night before at the fire department. Although John and Peter Quirk testified that the flexible scheduling for Jones ended in 1994, the evidence establishes that the practice continued into 1996 (R. Exh. 26B). The August 1 change therefore was inconsistent with the policy of accommodating employee personal schedules. Accordingly, I find that the August 1 change was a change in the status quo.

Further, the evidence reflects that prior to August 1, Jones was allowed to take lunch and breaks, and to take time off, whenever he wanted. The memo therefore placed restrictions on these aspects of his employment that never before existed thereby changing the status quo.

I therefore find that the Respondent violated Section 8(a)(5) of the Act, when it unilaterally implemented changes in Ken Jones' work hours, lunch and breaktimes, and when it unilaterally imposed requirements for requesting time off.

With respect to Ken Jones' wage incentive plan, the evidence shows that the August 1, memo significantly changed the terms of his wage incentive plan which had been in effect since 1993. (Compare: G.C. Exhs. 20 and 16.) The Respondent argues that the changes to Jones' plan were not unilateral changes because a "flexible" wage incentive plan was already in place, which Jones never objected to. The evidence discloses that the wage incentive plan was unilaterally implemented without the Local 841's knowledge or consent. Jones testified that he never told any union representative about his wage incentive plan. Even though he was the union steward, I find that his acquiescence does not constitute a clear and unmistakable waiver by the Union of its statutory right to notice and an opportunity to bargain. Cf. *Owens-Corning Fiberglass*, 282 NLRB 609 (1987) (a union's acquiescence in previous unilateral changes does not operate as a waiver of its rights to bargain over such changes for all time). Further, in the absence of any evidence that the Respondent changed, attempted to change, or was entitled to change Jones' plan at any time between its inception and impasse, the changes that were unilaterally implemented in August 1995, represent a change in the status quo over which the Union had a right to bargain. See *Leeds & Northrup, Co. v. NLRB,* 391 F.2d 874 (3d Cir. 1968), enfg. 162 NLRB 987 (1967).

Also, to the extent that the Respondent seeks to argue that, pursuant to its "final offer" proposal it had unlimited discretionary authority to change Jones' wage incentive plan, the implementation of that authority as noted above contravenes the holding of *McClatchy II* and likewise constitutes a violation of the Act. I therefore find that Respondent violated Section 8(a)(5) of the Act by unilaterally changing Ken Jones' wage incentive plan on or about August 1, 1995.

The evidence also shows that the Respondent unlawfully attempted to establish a production quota for Jones by, and

[16] Of course, where, as here, the parties have bargained in good faith to impasse, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within the preimpasse proposals and are consistent with the offers the Union has rejected. There is no evidence, nor does the Respondent contend, that these specific changes as to Ken Jones' terms and conditions of employment were ever discussed during negotiations or that they were implemented after notifying and consulting with the Union.

though, the August 1 memo. There is no evidence that Jones was ever required to complete an established number of repairs per day nor was a proposal to that effect introduced during negotiations. I therefore find that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing or attempting to implement a production quota for Jones on August 1.[17]

Finally, I find that by dealing directly with Ken Jones, in the course of making the unlawful unilateral changes above, and by encouraging Jones to direct his comments or suggestions to Rich Davis, a supervisor, the Respondent also violated Section 8(a)(5) of the Act.

g. The unlawful refusal to allow Ken Jones to collect union dues

The General Counsel argues, and the complaint alleges, that the Respondent violated Section 8(a)(1) of the Act in August 1995 and March 1996, when Peter Quirk told Ken Jones there was no longer a union and that Jones could not collect union dues. The General Counsel contends that these statements implied that it was futile for the employees to continue to be represented by the Union. The Respondent asserts that Peter Quirk never made these remarks.

(1) The August 31, 1995 conversation

Ken Jones credibly testified that on August 31, he went to Josephine Lutz, the Respondent's office manager, to find out why union dues were not being deducted by the Respondent. His unrebutted testimony establishes that she told him that Peter Quirk said there no longer was a union and therefore the Respondent no longer had to deduct union dues. Jones also testified that when he attempted to collect the union dues himself, Peter Quirk in essence reiterated the same statement to him, saying there no longer was a union and that that Jones could not collect union dues. Peter Quirk denied that he ever told Jones that there was no union or that Jones was told he could not collect dues. Rather, Quirk said that he told Jones that "if he wanted to collect the funds, it was up to him, to go right ahead and do it." I am skeptical that Peter Quirk encouraged Jones to collect union dues. By this time the Respondent had unilaterally implemented its contract proposals, as well as other workplace changes. It had also altered Jones' terms and conditions of employment and refused to recognize his position as union steward. It is therefore less than likely that the Respondent would have done anything to accommodate the Union, particularly by encouraging it to collect union dues. In addition, while Peter Quirk denied telling Jones that there was no union, he did not deny that he told Josephine Lutz not to collect dues because there was no longer a union. Lutz, who was still employed by the Respondent, was not called as a witness to deny Jones' statements or to corroborate Peter Quirk's testimony. Her absence warrants an adverse inference that she would not have corroborated Peter Quirks' testimony. *Guardian Industries Corp*., 319 NLRB 542 (1995).

Finally, Peter Quirk's conduct immediately following the conversation with Jones is inconsistent with his testimony that he did not object to Jones collecting union dues. The undisputed evidence shows that minutes after speaking to Jones about collecting union dues on August 31, Peter Quirk called Jones into his office and gave him a written warning for allegedly leaving work at 3 p.m., on August 29. Peter Quirk never explained why he chose that moment to discipline Jones for something that happened 2 days before. It is hard to reconcile why he would tell Jones "to go right ahead" and collect dues, and then minutes later give him a written warning. The inconsistency between his testimony and his conduct taints his credibility. His conduct supports an inference that he opposed the collection of union dues, rather than encouraged it.

For these, and demeanor reasons, Peter Quirk's testimony on this point was not credible. I therefore find that the Respondent violated Section 8(a)(1) of the Act, when Peter Quirk told Jones on August 31, that he could not collect union dues.

(2) The March 11, 1996 conversation

Ken Jones also testified that a similar scenario occurred on March 11, 1996. As he was soliciting union dues from employees, Peter Quirk told him there no longer was a union and that he could not collect dues. Unlike the August 31 encounter, the Respondent takes the position that the March 11 conversation never occurred because Jones did not work on March 11. Relying first on a timecard for Jones (G.C. Exh. 24), the Respondent asserts that Jones took the day off on March 11, because his timecard was not clock punched. Instead, the timecard has "8 hours" was handwritten on it for March 11, which the Respondent argues is evidence that Jones took the day off.

But the neither the timecard or any other payroll record reflects that Jones was actually off "8 hours" on March 11. To the contrary, General Counsel's Exhibit 25, which is a payroll worksheet for the week of March 11, discloses that Jones worked 8 regular hours on March 11. Peter Quirk testified that Josephine Lutz would be the best person to explain the document, but she was not called as a witness by Respondent. Her absence warrants an adverse inference that she would not have corroborated the Respondent's interpretation of the timecard and payroll record. *Guardian Industries Corp.,* supra.

The Respondent also relies on the testimony of John Quirk, who said that he was "absolutely certain Ken Jones did not work that day" because he got a call from one of his biggest customers that morning regarding a tire that Jones was repairing. Quirk remembered the call because he could not find Jones to ask him about the repair. The evidence shows, however, that John Quirk may have had his dates mixed up. For example, he testified that David Bradley did not begin work until the week after March 11, even though the undisputed evidence shows that Bradley began work on March 12. And despite Quirk's insistence that he worked the week of March 11, the evidence reflects that he was on vacation. According to General Counsel's Exhibit 25, which is a Respondent's payroll sheet for March 11–17, 1996, John Quirk received vacation pay for the entire week. When asked to explain the inconsistency, John Quirk could not explain why Josephine Lutz had marked "vacation" on the payroll record. He later testified that instead of taking vacation, he sometimes gets a double pay, which is reflected as vacation on the payroll record. He admitted that there was no way to tell whether that is what happened without looking at other management documents. But none of those documents was offered into evidence nor was Lutz called to explain what she had done and why. The absence of this corroborating evidence warrants an adverse inference that Lutz would not have corroborated John Quirk's testimony. The credible evidence therefore raises serious doubts about John Quirk's recollection and whether he actually worked the week of March 11.

[17] In its brief, the Respondent does not argue that the unilateral imposition of a production quota on Jones, which was contained in the August 1 memo, was lawful.

On the other hand, the evidence establishes that Peter Quirk and Jones could have had the conversation on March 11, because Quirk was at work on that day. Although he testified that he attended a funeral on March 11, he conceded that he worked at least part of the day. Given that concession, plus Jones' credible testimony that he worked on March 11, I find that Jones and Peter Quirk not only worked on March 11, but during the course of the day, Peter Quirk told Jones there no longer was a union and he could not collect union dues. Accordingly, I find that Peter Quirk's remark on March 11 that there was no longer a union and Jones could not collect union dues, violated Section 8(a)(1) of the Act.

5. The unlawful discipline and discharge of Ken Jones

In *Wright Line,* 251, NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[18] Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action which tends to encourage or discourage union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of union activity. *T&J Trucking Co.,* 316 NLRB 771 (1995). Inferences of animus and discriminatory motivation may be inferred from the total circumstances proved. In some cases, animus and discriminatory motivation may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Evidence of suspicious timing and false reasons given in defense will support such inferences.

a. The August 31 written warning

The credible evidence establishes that on August 31, Jones was engaged in union activity, known to and opposed by the Respondent, which was followed by an adverse action which tended to discourage that activity. Jones solicited union dues from employees, was told by Peter Quirk that there no longer was a union, and that he could not collect union dues. Minutes later, he received a written warning for leaving work early 2 days before. The evidence supports an inference that the written warning was given at a time when the Respondent sought to minimize the influence of the exclusive bargaining representative and sought to emphasize to the employees that the Union was unnecessary. Accordingly, I find that the General Counsel has satisfied his initial evidentiary burden.

The Respondent argues, however, that a violation of the Act cannot be found because there is no evidence of unlawful motivation. It contends that Jones would have been disciplined even in the absence of union activity because of poor work performance. Specifically, the Respondent asserts that Jones was repeatedly counseled about maintaining a regular work schedule, but that he nevertheless abused his lunch hours, was habitually tardy, frequently left work early, and was not very productive. As a result, when he left work early without permission on August 29, 1995, he justifiably was given a written warning, which was his second written warning.

[18] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

The evidence, however, does not substantiate the Respondent's position. Aside from the generalized assertions of John and Peter Quirk that Jones was an unsatisfactory employee, who was tolerated for quite some time, and was disciplined frequently, the Respondent did not introduce a single piece of paper which corroborated their testimonies . There is no record of Jones ever receiving a prior written or verbal warning. Quite the contrary, the testimony of Peter Quirk establishes that he never warned Jones in writing. Peter Quirk testified that he had never given Jones a written warning prior to August 31 and that he had no record of Jones receiving a verbal warning (Tr. 320). John Quirk likewise testified that he never gave Jones a written warning. His testimony also raises significant doubts about whether he ever verbally disciplined Jones. John Quirk was asked:

> Q. Did you ever give him a written warning?
> A. I gave him many verbal warnings.
> Q. Did you ever document those verbal warnings?
> A. I—it was documented in front of his direct superior [Tr. 402] dozens and dozens of times.
> Q. Was it ever added to his personnel file?
> A. I'd have to check his personnel file.
> Q. Well, did you ever add anything to his personnel file with respect to these dozens of verbal warnings?
> A. No, no, I did not personally.
> Q. Have you looked in his personnel file to see if there are any—if there's any documentation with respect to verbal warnings?
> A. Sir, it was well known throughout the company that Mr. Jones-
> Q. No, no, the question is did you ever look in his personnel file to see if there was any documentation of these verbal warnings?
> A. No, I have not. [Tr. 403.]

The reluctance of John Quirk to admit directly that he did not give Jones a written warning or even record one verbal warning,[19] or even check Jones' personnel file to determine whether there was any documented discipline for him further taints John Quirk's credibility, and underscores the dearth of evidence showing that Jones was a unsatisfactory employee, who failed to respond to progressive disciplinary efforts.

Careful review of the record reveals that the only writing referenced by the Respondent which pertained to Jones' work performance is a memo, dated April 4, 1995, which sought to prioritize his work (R. Exh. 24). The evidence shows that the memo was prepared by John and Peter Quirk, purportedly because they were concerned that Jones' productivity was dropping off. After it was typed, the memo was read to John Quirk over the phone and his name was signed by his brother, Peter Quirk. But the memo was never moved into the record and there is no evidence that it was ever given to Jones or discussed with him. Peter Quirk testified that he did not discuss the memo with Jones, but he "knew" that his brother, John, gave Jones the memo, because he and John had discussions about it. But John Quirk testified that he did not give the memo to Jones nor is there any evidence that Jones and John Quirk ever discussed it. John Quirk, however, was sure that his secretary, Lucy Wright,

[19] The evidence establishes that there is a place to record such information on the Respondent's "Employee Warning Report" form. (See G.C. Exh. 18.)

gave Jones the memo, but he never bothered to double check with her to confirm that she did (Tr. 412). John Quirk nevertheless was positive that "Lucy handed [the memo] to Jones and Dave Bradley or whoever was in the manager's office at that time would have handed it to Ken (Jones)," even though Bradley did not begin working for the Respondent until 11 months later. He then stated with confidence that a copy was handed to Jones by Lucy or his brother, Peter, but admitted that he was not present when that occurred. Despite John Quirk's insistence that Jones received a copy of the memo, the evidence shows that his assertions were purely speculative, which further undercuts his credibility,[20] and which raises significant doubts about whether he ever warned or counseled Jones about his work performance in the first place.

The Respondent's position that the written warning was justified is also undercut by the fact that the warning was inaccurate on its face. Although it stated that Jones left work early without permission at 3 p.m. on August 29, his timecard for that day reflects that he worked until 3:30 p.m. When the discrepancy was pointed out to Peter Quirk at the hearing, he dismissed it as not being terribly significant. The warning also stated that it was Jones' second written warning, but there is absolutely no evidence to support that assertion. Despite the lack of evidence, Peter Quirk refused to acknowledge the mistake when Jones immediately pointed it out to him on August 31. These inaccuracies, coupled with Peter Quirk's reluctance to acknowledge them, support the inference that the written warning was a hasty reaction designed to discourage union activity, rather than a justified disciplinary measure designed to curtail a longstanding work performance problem.

Not only does the evidence fail to establish that Jones would have been disciplined even in the absence of his union activity, the timing of the written warning alleviates any suspicion that it was unlawfully motivated. Nowhere does Peter Quirk or the Respondent explain why he waited 2 days before giving Jones a written warning for leaving work early on August 29. Nowhere does Peter Quirk or the Respondent explain why he gave Jones the written warning only minutes after their confrontation on collecting union dues. Nowhere does Peter Quirk or the Respondent explain why no further disciplinary action was taken against Jones—until he solicited union dues again, on March 11, even though he continued to leave work early and come in late after August 29. I find that the timing of the written warning, standing alone, supports the inference that the warning was unlawfully motivated.

For all of these reasons, I find that the Respondent has failed to satisfy its evidentiary burden. The total circumstances proved to support an inference that had it not been for Jones' union activity on August 31, a written warning would not have been issued. Accordingly, I find that the Respondent unlawfully disciplined Ken Jones on August 31, in violation of Section 8(a)(3) of the Act.

b. The unlawful termination of Jones

(1) Knowledge and opposition to union activity

The credible evidence as determined above establishes that when Jones solicited union dues on March 11, Quirk told him again that there no longer was a union and that he could not collect the dues. Peter Quirk therefore knew of and opposed Jones' union activity on March 11. The Respondent argues, however, that the General Counsel has failed to prove knowledge because the ultimate decision to terminate Jones was made by David Bradley, who had no knowledge that Jones was a union steward or that he had sought to collect union dues on March 11.

While Bradley may not have known of Jones' union position and union activity, it is of no significance because the evidence reflects that the decision to terminate Jones was not his or not his alone. Despite Bradley's testimony that "[he] made the decision," the evidence discloses that he discussed the matter with Peter Quirk the same day Jones' timecard was reported missing. Peter Quirk likewise confirmed that the two of them discussed the situation before Bradley prepared the letter. Bradley then gave Quirk the letter to review, which he did, stating, "[O]kay, send it." In addition to conferring with Peter Quirk, the evidence shows that Bradley was a brand new employee, who was in training with Peter Quirk, and that he was not even Jones' immediate supervisor. Bradley himself conceded that Jones' immediate supervisor was still Rich Davis (Tr. 242–243), who also reported to Peter Quirk. Thus, the evidence shows that not only did Bradley confer with and/or obtain the approval of Peter Quirk before sending the termination letter, he lacked the sole authority to terminate Jones at that point in time. I therefore find that the decision to terminate Jones was made, in part or whole, and/or approved by Peter Quirk, who had knowledge of Jones' union office and union activity.

I therefore find that the General Counsel has persuasively established that there was union activity by Jones, known to and opposed by the Respondent, which tended to discourage union activity.

(2) The adverse action tending to discourage union activity

Two days after Jones was told that he could not collect union dues,[21] his timecard suspiciously disappeared. Even Peter Quirk conceded that something like this had never happened in his experience with the Respondent. After 20 minutes passed while Bradley looked for the timecard and conferred with Peter Quirk, Bradley returned and told Jones that he was no longer needed. Jones credibly testified that 2 days later, on Friday, March 15, his coworker, Arnie McNally, phoned on behalf of the Respondent, asking him to return his uniforms and keys.

[20] Other aspects of John Quirk's testimony were equally unreliable. Although he recalled Jones working on Saturday only once, the evidence establishes that in the last year of his employment alone, Jones worked several Saturdays (R. Exh. 26B), to wit: January 14, 1995; February 25, 1995; June 17, 1995; July 1, 1995; July 15, 1995; August 12, 1995; August 26, 1995; September 9, 1995; September 30, 1995; October 7, 1995; October 21, 1995; November 4, 1995; November 11, 1995; January 6, 1996; January 27, 1996; February 10, 1996, and February 24, 1996. This evidence illustrates the extent to which John Quirk generalized and overstated his testimony. Also, as noted above, John Quirk mistakenly thought that Bradley actually began working the week after March 11, even though everyone else agreed that Bradley started work on March 12, and he insisted that he was not on vacation the week of March 11, even though the payroll records reflect that he was on vacation.

[21] The credible evidence establishes that Jones did not work for the Respondent on March 12, but instead worked at the fire department. Despite David Bradley's assertions that Jones reported that his timecard was missing on March 12, which was Bradley's first day on the job, Jones credibly testified that he worked all day at the fire department. His testimony was corroborated by documentary evidence (G.C. Exh. 27). For reasons explain below, I find that Bradley's testimony was unconvincing. I therefore credit Jones' testimony that he next reported to work for the Respondent on Wednesday, March 13.

Jones returned the items to Lucy Wright on March 18. Jones later received the March 18 letter stating that his employment had been terminated. I find that this evidence sufficiently shows the Respondent responded promptly to Jones' second attempt to collect union dues by taking adverse action which tended to discourage the union activity.

I therefore find that the General Counsel has satisfied his initial evidentiary burden.

c. The Respondent's defense

The Respondent argues that Jones was not discharged from his job, he simply quit. But the notion that Jones walked away from his job is implausible. The evidence establishes that Jones had worked for the Respondent since 1990, and according to the testimony of John and Peter Quirk, Jones had an ideal employment arrangement. His work schedule with Respondent was tailored to accommodate his duties at the fire department. He was allowed to leave early when he needed to, and take time off when he had to. He took his lunch and breaks when he wanted to. In essence, John and Peter Quirk painted a picture of an employee who came and went whenever he chose, much to their chagrin. And even after the Respondent unilaterally changed his work schedule on August 1, the evidence shows that it did not attempt to enforce the new schedule—until Jones solicited union dues on August 31. The evidence (R. Exh. 26B) also shows that after August 31, the Respondent continued to allow Jones to leave work early and come in late whenever necessary, without incident or disciplinary action, until March 11, 1996, when he attempted to collect union dues again. Thus, while the Respondent argues that Jones simply quit his job, neither the evidence nor the Respondent has provided a compelling reason for him to have done so.

Further, there is no direct evidence that Jones quit his job. Nowhere in the record is there any evidence that Jones told or advised anyone that he was quitting his employment with Respondent. He did not say "I quit" to Bradley, Peter Quirk, or anyone else, he did not tender a resignation letter, and he did not turn his uniforms and keys until he was asked to do so. In the latter connection, the evidence shows, and the Respondent does not dispute, that on March 15, Jones was asked by McNally at the Respondent's request to return his uniform and keys. I note that the Respondent does not deny that it asked Jones to return his uniform and keys prior to March 18. The evidence also shows, and the Respondent does not dispute, that Jones complied by returning these items on that date. Finally, the evidence shows that after Jones returned his uniform and keys, the Respondent sent him a letter terminating his employment, effective March 18, 1996 (R. Exh. 29). The credible evidence therefore shows that Ken Jones did not quit his job. Rather, he was terminated, in writing, by the Respondent, and that the decision to terminate him was made prior to March 18.

The issue then becomes whether the reasons for termination are pretextual. David Bradley testified that Jones was terminated because he failed to report to work, did not contact his supervisor, and failed to respond to telephone messages. David Bradley's testimony as to why Jones was terminated was unconvincing for several reasons. First, Bradley's testimony was inconsistent. In an earlier affidavit, he said that there were no timecards in the rack, when Jones reported that his timecard was missing. He testified at the hearing, however, that he saw a number of timecards in the rack, none of which belonged to Jones. When given the opportunity to reconcile the inconsistency, he passed it off without explanation by stating: "This is how I recall it."

Second, Bradley's testimony was overstated with respect to the decision to terminate Jones. Although that he declared that he alone terminated Jones, the preponderance of evidence shows that the decision was made by, was made with, or was made after obtaining the approval of Peter Quirk.

Third, Bradly also overstated his efforts to contact Jones. He testified that when he could not find Jones, he obtained Jones' phone number from Josephine Lutz, and for 2 days unsuccessfully left messages on Jones' answering machine. However, Bradley could not remember the number he called, nor did he record his attempts to contact Jones, nor could he say whether the answering machine he reached belonged to Jones. Although someone told Bradley that Jones worked for the Boston Fire Department, he did not try to contact him there. When asked whether there was a telephone number for the Boston Fire Department in Jones' personnel file, Bradley responded, "I don't recall." When asked whether he sought to obtain the phone number from whoever told him that Jones worked at the fire department, Bradley said that the person did not offer him a phone number and that he did not ask for one. He did not ask Arnie McNally for the Jones' fire department phone number, even though he knew Jones and McNally were close friends. Nor did he ask Rich Davis, who was Jones' immediate supervisor, for the fire department phone number. Bradley eventually conceded that he did not even speak to Rich Davis about Jones' absence on March 13. The evidence therefore establishes that Bradley's efforts to contact Jones were not as exhaustive as he would lead one to believe.

For these, and demeanor reasons, I find that the testimony of David Bradley in support of the reasons for terminating Ken Jones was not credible.

Peter Quirk's testimony that he also tried unsuccessfully to contact Jones does little to bolster Bradley's credibility. Quirk testified that he called a fire station in the area where Jones lived, but was not successful in reaching him. He speculated that there were 50–60 fire stations in Boston, so he stopped trying–after one attempt. Jones testified that he gave Quirk his phone number at the fire station where he worked and that Quirk had phoned him there on a couple of occasions in late 1995 or early 1996. He also credibly testified that he gave Quirk his pager number. On recall, Peter Quirk admitted that Jones had given him the phone number of the fire department where he worked and that he had called Jones at the fire station once. He stated, however, that he subsequently lost the phone number and denied ever receiving Jones' pager number. I find that Peter Quirk's explanation of what he did to contact Jones and why he did not do more, is dubious. I do not credit his testimony denying that he lost the fire department phone number or that he did not receive the pager number. Rather, the credible evidence shows that Peter Quirk had the method and means to contact Jones, if he truly desired to do so. For these, and demeanor reasons, I find that the testimony of Peter Quirk in support of the reasons for terminating Ken Jones is not credible.

I find that the Respondent's reasons for terminating Jones were pretextual. The total circumstances proved support an inference that Jones was not allowed to return to work on March 13, because he had attempted to collect union dues again. I credit Ken Jones' testimony that, after conferring with Peter Quirk, Bradley told Jones that he was no longer needed and that he could go home. Accordingly, I find that Kenneith

Jones was unlawfully terminated by the Respondent in violation of Section 8(a)(3) of the Act.

6. The alleged violation of Section 8(a)(4)

The complaint also alleges that Jones was terminated for giving an affidavit in connection with the charge in Case 1–CA–33249. The evidence shows that Jones prepared a letter, dated February 22, 1996 (G.C. Exh. 19), in which he complains about how he had been treated at work over the past several weeks and ever since he gave a "deposition" to the NLRB. Jones testified that he placed the letter in John and Peter Quirk's mailboxes at work on February 23. The following week he asked John Quirk if he wanted to discuss the letter, but John Quirk declined saying that he did not have time at the moment. Both John and Peter Quirk stated that they never saw or received the letter. For demeanor reasons, and for the previously stated reasons for questioning their veracity, I do not credit John and Peter Quirk's testimony that they did not receive or read the letter on or about February 23 or shortly thereafter.

On the other hand, the evidence does not establish that the affidavit given by Jones precipitated the Respondent to terminate him. Rather, the evidence establishes that the termination on March 13, was in response to Jones' attempt to collect union dues. I shall therefore recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive bargaining representative for all individuals employed by The Edward S. Quirk Co., Inc. in the following appropriate bargaining unit:

> All employees engaged in the maintenance and servicing of tires, including all tire men, front end men, and helpers employed by Respondent at the Watertown facility, excluding all executives, office clericals, counter salesmen, porters, salesmen, driver salesmen, guards, professional employees, and supervisors as defined in the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by:

(a) Telling its employees that there would be a health insurance copayment regardless of how the union membership voted.

(b) Telling Kenneith Jones in June and August 1995, and in March 1996, that there no longer was a union.

(c) Telling Kenneith Jones on August 31, 1995, and on March 11, 1996, that he could not collect union dues.

4. The Respondent has violated Section 8(a)(3) of the Act by:

(a) Giving Kenneith Jones a written disciplinary warning on August 31, 1995, because he engaged in union activity.

(b) Terminating Kenneith Jones on or about March 13, 1996, because he engaged in union activity.

5. The Respondent has violated Section 8(a)(5) of the Act by:

(a) Unlawfully delaying payments to the International Brotherhood of Teamsters Health and Welfare Fund.

(b) Unilaterally implementing its wage proposal on June 1, 1995.

(c) Refusing to discuss employee concerns and grievances with Union Steward Kenneith Jones in June and August 1995.

(d) Unilaterally changing or attempting to change in August 1995, Kenneith Jones' hours of work, lunch and breaktimes, procedure for requesting time off, wage incentive plan, and by imposing a repair production quota.

6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminatorily laid off employee Kenneith R. Jones because of his union activity, has unlawfully changed his wage incentive plan, hours of work, lunch and break time, has unlawfully imposed a procedure for requesting time off and has unlawfully required a certain number of repairs each day, I shall recommend that The Edward S. Quirk Co., Inc. be ordered with respect to employee Kenneith R. Jones to restore the status quo ante as it existed prior to August 1, 1995, reinstate employee Jones to his former position, and make him whole for any loss of wages and benefits he may have suffered as result of his unlawful termination and as a result of the unlawful unilateral change made to his wage incentive plan. Backpay is to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[22]

Having found that the Respondent unlawfully implemented its wage proposaI on or about June 1, 1995, I shall recommend that The Edward S. Quirk Co., Inc., on request, bargain with the Union as the representative of the employees in the unit described above, about the method, manner, timing and amounts of adjustments to wages and incentive pay to be granted in accordance with the wage incentive plans for both commercial operations employees (e.g., recap employees and OTR service repairs) and the general mechanics and alignment technicians and, at the Union's request, that it rescind any pay adjustments that affected the unit employees pursuant to the unlawfully implemented wage proposal on June 1, 1995, and make the unit employees whole for any loss of wages they may have suffered on or after June 1, 1995, as a result of the unlawful implementation of the wage proposal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, The Edward S. Quirk Co., Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

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[22] The remedy applies to both the 8(a)(3) and (5) violations relating to employee Kenneith R. Jones, and also applies to any wage loss incurred by unit employees because of the Respondent's unlawfully implemented wage proposal on June 1, 1995, in violation of Sec. 8(a)(5) of the Act,

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discouraging membership in, or undermining the status of, the Union or any other labor organization by telling its employees that the Union no longer exists, refusing to discuss grievances with the Union's representatives, unilaterally implementing changes in terms and conditions of employment of employee Kenneth R. Jones or any of its employees without notifying and consulting the Union first, or disciplining, or discharging any of its employees, or by discriminating in any other manner in regard to their tenure of employment or any other term or condition of employment.

(b) Adjusting wages and incentive pay and/or granting incentive pay in the following appropriate bargaining unit without bargaining with International Brotherhood of Teamsters, Local Union No. 25, AFL–CIO, about the method, manner, timing and amounts of those adjustments and/or incentive payments. The appropriate unit is:

> All employees engaged in the maintenance and servicing of tires, including all tire men, front end men, and helpers employed by Respondent at the Watertown facility, excluding all executives, office clericals, counter salesmen, porters, salesmen, driver salesmen, guards, professional employees, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with International Brotherhood of Teamsters, Local No. 25, AFL–CIO as the representative of employees in the above-described appropriate unit, about the method, manner, timing and amounts of wage and/or incentive pay adjustments and/or granting incentive pay, prior to making those wage and/or incentive pay adjustments and/or prior to granting incentive pay.

(b) On request by the above-named labor organization, rescind any wage and/or incentive pay adjustments as a result of unilateral action.

(c) Make the unit employees whole for any loss of wages suffered on or after June 1, 1995, as a result of the wage proposal unlawfully implemented on that date.

(d) Within 14 days from the date of this Order, offer immediate full reinstatement to Kenneth R. Jones to his former position or, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and under the same terms and conditions of employment which pertained to him prior to August 1, 1995.

(e) Make whole Kenneth R. Jones, with interest, in accordance with the remedy section of this decision, for wage and benefit losses that he may have suffered as a result of the discrimination against him, including his unlawful termination and the unlawful changes made on August 1, 1995, to his wage incentive plan.

(f) Within 14 days from the date of this Order, remove from its files any references to the unlawful discipline on August 31, 1995, and unlawful termination on or about March 13, 1996, of Kenneth R. Jones, and within 3 days thereafter notify him in writing that this has occurred and that the discipline and termination shall not be used against him in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Watertown, Massachusetts, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."